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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LOUIS WHITE, Defendant and Appellant.	B230371 (Los Angeles County Super. Ct. No. NA082581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Louis White appeals from a jury verdict convicting him of one count of murder (Pen. Code, § 187, subd. (a))[1] and one count of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1).)[2] He contends it was prejudicial error for the court to: (1) deny his motion for a pretrial lineup under *Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*); (2) instruct the jury according to CALJIC No. 2.92; (3) fail to provide a limiting jury instruction of the use of his stipulated prior felony conviction; (4) admit testimony to impeach Latrina Howard, White's former girlfriend; (5) permit the prosecutor to pose hypothetical questions to expert witnesses; and (6) fail to instruct the jury on the elements of the section 12021, subdivision (a)(1) charge. He also raises a claim of prejudicial cumulative error.

We conclude it was proper for the court to deny White's motion for a pretrial lineup, to instruct the jury according to CALJIC No. 2.92, and to permit the prosecutor to impeach Howard and pose hypothetical questions to the expert witnesses. While we find White's other claims of instructional error are meritorious, these errors were harmless. Finding no prejudicial error, we affirm the conviction.

FACTUAL AND PROCEDURAL SUMMARY

On January 31, 2009, 15-year-old Ezra Davis was shot two times near his home in Long Beach. He later died from his wounds.

Renee McClellan and Joan Henley were outside talking at the time of the shooting. When McClellan heard gunshots she turned around and saw two African American men. She saw Davis fall to the ground and the other man run northeast on Washington Boulevard. This man was wearing a white T-shirt and denim jeans. She thought he had a short Afro or braids that were not newly braided. McClellan did not see anyone else in the area. She did not get a good look at the shooter and was unable to identify him.

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

[2] Operative January 1, 2012, this statute was repealed and reenacted as section 29800, subdivision (a)(1) without substantive change.

Joan Henley heard a gunshot and saw Davis fall to the ground. She then saw the shooter fire two more shots at Davis. Henley was unable to identify the shooter because her view was obstructed by a tree. She saw the shooter holding the gun in his right hand.

After hearing gunshots, Shawnese Armstrong looked out the window in her home and saw a man running on north Washington. She observed the man enter a red car with an AAA sticker and drive away. She described him as an African American man, approximately six feet one inch tall, heavyset, with shoulder length braids, and wearing a white T-shirt and jeans.

Amelia Jimenez was in her garage when she heard gunshots and saw a man running on Washington. The runner had shoulder length braids and was wearing a white T-shirt, blue jeans, and a white hospital bracelet. She saw no other person in the area. She called to her son-in-law Guillermo Gutierrez. Jimenez pointed to a man driving in a red car as the man she saw running away. The car had a DMV permit in its window.

Gutierrez also saw the red car with the DMV permit on the back window. He thought it was a late 1980's Acura Legend since he used to own a 1987 Acura Legend that looked similar. While Gutierrez could not identify the driver, he thought he appeared to be 30 to 35 years old with shoulder length braids and wore a white hospital bracelet.

Police officers from the Long Beach Police Department observed a car matching the description provided by Armstrong, Jimenez, and Gutierrez. They identified the car as being registered to Howard, White's former girlfriend. It was a red 1990 Acura Legend with a DMV sticker in the rear window. It did not have an AAA sticker. Officers conducted surveillance of the car and observed White driving it.

Both Armstrong and Jimenez identified White from a six-pack photographic lineup presented to them by the Long Beach Police Department (LBPD). Armstrong, Jimenez, and Gutierrez identified Howard's car as the one they saw the runner driving.

White was charged in count one with murder, a violation of section 187, subdivision (a), and in count two with being a convicted felon in possession of a firearm, a violation of former section 12021, subdivision (a)(1). It also was alleged that White personally used and discharged a firearm causing great bodily injury (§ 12022.53, subds.

(b)-(d)), the crimes were committed for the benefit, or at the direction, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and White had committed a prior felony crime and sustained prior strike convictions. White pleaded not guilty.

At trial the prosecutor presented evidence that Eric Battieste was shot in the head by a member of the gang Insane Crips two days before Davis was killed. Battieste was a member of the gang Rolling 20's Crips, rivals of the Insane Crips. The prosecutor presented evidence that White also was a member of the Rolling 20's Crips and was distraught over the shooting of Battieste. Davis, though not a member, was associated by family with the Insane Crips.

White presented an alibi defense and a defense that he was left-handed and would not have shot a gun with his right hand. He also denied belonging to a gang. White stipulated to his prior convictions.

The jury found White guilty of both counts and found the firearm enhancement to be true. It found the gang enhancement to be not true.

White was sentenced to a total term of 80 years to life on count one. The sentence on count 2 was stayed under section 654. This timely appeal followed.

DISCUSSION

I

White claims the court abused its discretion in denying his motion for a pretrial lineup pursuant to *Evans, supra*, 11 Cal.3d 617, resulting in a violation of his rights to due process and a fair trial.

We first address respondent's argument that White forfeited his claim of error by not filing a petition for a writ of mandate. The issue whether a challenge to a denial of a pretrial lineup must be raised by way of pretrial writ or may be raised on appeal is pending before the Supreme Court. (See *People v. Mena* (2009) 173 Cal.App.4th 1446, review granted August 26, 2009, S173973.) In *People v. Mena*, the appellate court held that the failure to pursue writ relief waives the claim of error. However, precedent established before *People v. Mena* held that failure to seek writ review does not constitute forfeiture of a postjudgment direct appeal challenging a pretrial ruling. A defendant may

seek writ review in the context of a pretrial discovery violation, but his failure to do so does not preclude appellate review following final judgment. (See *People v. Batts* (2003) 30 Cal.4th 660, 678; *People v. Memro* (1985) 38 Cal.3d 658, 675–676, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) We follow this line of authority until the Supreme Court directs otherwise and assume for the purposes of this decision that White may seek reversal of the judgment on appeal based on his claim of error under *Evans*.

The California Supreme Court "concluded in *Evans*[, *supra*,] 11 Cal.3d 617 . . . that 'due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.' (*Id.* at p. 625.) [The court] also concluded that '[t]he questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries which necessarily rest for determination within the broad discretion of the magistrate or trial judge.' (*Ibid.*)" (*People v. Redd* (2010) 48 Cal.4th 691, 723 (*Redd*).)

White moved for an order compelling the attendance of Armstrong and Jimenez at a pretrial lineup. The trial court denied the motion on the ground that there was no reasonable likelihood of mistaken identification which a lineup would tend to resolve. We find no abuse of discretion. (See *Redd, supra*, 48 Cal.4th at p. 723.)

In support of his motion, White argued a reasonable likelihood of misidentification existed on the ground that McClellan and Henley, who actually witnessed the shooting, did not identify White. But both of these witnesses stated that they did not have a good view of the shooter or get a good look at him, while Armstrong and Jimenez said they were able to see the runner clearly.

Both Armstrong and Jimenez identified White as the person they saw running away from the shooting. They heard gunshots and saw White running north on Washington, away from the location of the shooting. The somewhat varying descriptions

provided by Armstrong and Jimenez on the one hand and McClellan and Henley on the other, do not raise the possibility that Armstrong and Jimenez misidentified defendant as the runner. They only present the possibility that the person seen shooting Davis by McClellan and Henley was not the person seen running from the shooting by Armstrong and Jimenez.

Armstrong and Jimenez provided descriptions of the runner that were fairly uniform and corresponded to White's appearance at the time. Armstrong was shown a photographic lineup without White's picture and said that the runner was not present. When shown a photographic lineup containing White's picture, both Armstrong and Jimenez independently identified him. White does not challenge the lineups as impermissibly suggestive.[3]

Although not identical, descriptions of the car provided by Armstrong, Jimenez, and Gutierrez also were similar as they each described a red car with a sticker in the rear window. Gutierrez provided the exact make and model of the car and estimated a year range. He based his identification on the fact that he previously had owned the same model. Police officers matched this description to Howard's car and viewed defendant driving the car in the days after the shooting.

This evidence demonstrates that the inability of McClellan and Henley to identify White as the shooter "did not compel the trial court to conclude there was a reasonable likelihood of mistaken identification" by the witnesses who did identify him. (*Redd, supra,* 48 Cal.4th at p. 725.)

White contended that Armstrong and Jimenez were equivocal in their identifications because in their statements to the police, each said that White "looked like" the person they saw running from the shooting. This is not an equivocal statement and the certainty of their identifications was a subject for cross-examination by White's trial counsel.

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[3] While White makes passing reference to the brightness of his shirt in the photograph, he presents no legal challenge based on the suggestibility of the lineup.

White was provided with the statements and descriptions of the two witnesses, along with all of the information associated with the photo lineups. "He thus had ample opportunity to challenge the identifications at trial, even without a pretrial physical lineup." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 561.) It is "unlike the situation in [*Evans,*] *supra*, 11 Cal.3d 617, where the witnesses' ability to link the defendant to the crime was explored for the first time at trial, the substance and quality of the eyewitnesses' observations in this case and their ability to identify defendant were known long before defendant filed his motion. That the witnesses had picked defendant out of pretrial photographic lineups also meant they could not have been influenced by the inherent suggestiveness of his presence at the defense table. That the witnesses had identified defendant from a photograph taken [closer to the time of] the murder was more significant than their ability or inability to pick him out of a live lineup conducted long after the murder." (*People v. Abel* (2012) 53 Cal.4th 891, 913.) The record suggests White's appearance had changed since the time of the crime since he had cut his hair, no longer wore braids, and had grown facial hair. (See *ibid.*)

In sum, we find no abuse of discretion in the court's denial of White's motion for a pretrial lineup.

II

Defendant contends the trial court committed prejudicial error by instructing the jury that "[i]n determining the weight to be given eyewitness identification testimony, you should consider . . . [¶] . . . [¶] [the] extent to which the witness is either certain or uncertain of the identification." (CALJIC No. 2.92.)[4] He argues that the instruction is erroneous because scientific experts dispute the proposition implicit in this instruction—

[4] The instruction reads in pertinent part: "In determining the weight to be given eyewitness identification testimony, you should consider . . . factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following: [¶] . . . [¶] The extent to which the witness is either certain or uncertain of the identification. . . ." (CALJIC No. 2.92.)

that eyewitness certainty positively correlates with the accuracy of an identification. Since the California Supreme Court has approved the instruction, we find no error.

In *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*), our Supreme Court concluded that "CALJIC No. 2.92," including the portion challenged by White, "should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence." (*Id.* at p. 1144.) In *People v. Johnson* (1992) 3 Cal.4th 1183 (*Johnson*), our Supreme Court approved CALJIC No. 2.92 and rejected the defendant's challenge to the part of the instruction concerning witness certainty. (*Johnson*, at p. 1232.) The court found no error in the eyewitness certainty instruction despite the fact that the defense had presented expert testimony "without contradiction" at trial that "a witness's confidence in an identification does not positively correlate with its accuracy." (*Id*. at p. 1231; see also *People v. Arias* (1996) 13 Cal.4th 92, 168 [including "the level of certainty displayed by the witness at a suggestive confrontation," among "factors to be considered" in evaluating whether identification testimony should be suppressed], citing *Neil v. Biggers* (1972) 409 U.S. 188, 199-200; *People v. Clark* (1992) 3 Cal.4th 41, 135 ["the level of certainty of the identification" is a factor to be considered in determining admissibility of identification].)

In light of precedent holding that the certainty factor in CALJIC No. 2.92 is proper and "should be given" by the trial court (*Wright, supra*, 45 Cal.3d at p. 1144), we reject White's contention that the trial court erred by giving the instruction, especially since White did not object to it. (See *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303 [rejecting challenge to eyewitness certainty factor enumerated in CALJIC No. 2.92 based on Supreme Court's approval of CALJIC No. 2.92 in *Wright* and *Johnson*], disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

White argues that *Johnson* is no longer good law because "it has now been firmly established, based upon numerous scientific studies, that there is no correlation between witness confidence and accuracy." We do not agree because scientific evidence available at the time *Johnson* was decided was not markedly different from the evidence White relies upon in his brief. Indeed, of the 13 scientific articles White cites for the

proposition that eyewitness certainty does not correlate with accuracy, 11 were published prior to *Johnson*.

Moreover, White fails to account for the *Wright* majority's implicit rejection of Justice Mosk's dissent and his contention that the certainty factor is improper because it is contradicted by scientific evidence. (See *Wright, supra*, 45 Cal.3d at p. 1144.) Our Supreme Court clearly was aware of the scientific articles which called into question the certainty factor in CALJIC No. 2.92 when it approved the instruction in *Wright* and affirmed it in *Johnson*, because four years before *Wright* it recognized that "the majority of recent studies have found no statistically significant correlation between confidence and accuracy." (*People v. McDonald* (1984) 37 Cal.3d 351, 369, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Thus, it is clear that at the time it decided *Johnson* and *Wright*, our Supreme Court knew of the conflict White raises between the scientific evidence and CALJIC No. 2.92. We are not at liberty to disregard those cases.

White further attempts to distinguish *Johnson* by arguing that the court below failed to instruct the jury that the testimony of White's expert witness on eyewitness identification, Dr. Mitchell Eisen, was a factor they could consider among the other factors provided with the CALJIC instruction. In *Johnson*, the jury was instructed that it could consider "'[t]estimony of any expert regarding acquisition, retention, or retrieval of information presented to the senses of an eyewitness'" (*Johnson, supra*, 3 Cal.4th at p. 1232), along with the other factors enumerated in CALJIC No. 2.92.

The court informed the jury that it "should consider . . . other factors which bear upon the accuracy of the witness' identification of the defendant, including, *but not limited to*," a number of factors. (See CALJIC No. 2.92.) While the jury was not instructed that it should specifically consider Dr. Eisen's testimony among these factors, it was told those factors were not exclusive. Because Dr. Eisen's expert testimony addressed the accuracy of eyewitness identification, it was considered by the jury as "[an]other factor[] which bear[s] upon the accuracy of the witness' identification." White did not request the expert testimony factor be included in the instruction on eyewitness

identification. Further, the jury was given instructions relating to expert testimony and was told that it could accept or disregard any expert opinions it considered unreasonable.[5] (See CALJIC No. 2.80 ["Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable."].) "Thus, if the jury was persuaded by [Dr. Eisen's] testimony, the instructions allowed it to infer that [the witness's] positive identification was not necessarily an accurate one." (*Johnson, supra*, 3 Cal.4th at p. 1232.) Accordingly, we find no error in the trial court's instructions to the jury on eyewitness identification.

III

White contends the court committed prejudicial error in failing to give a limiting jury instruction concerning his status as a convicted felon at the time of the homicide. We find the error harmless.

White stipulated that he had a prior felony conviction. This enabled him to withhold the nature of the conviction from the jury. (See *People v. Valentine* (1986) 42 Cal.3d 170, 173 (*Valentine*).) When the stipulation was presented to the jury, White's trial attorney requested a limiting instruction. The court stated it would give the instruction at a later time but inadvertently did not do so. Neither party subsequently reminded or requested that the court provide the instruction.

"[W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose." (*Valentine, supra*, 42 Cal.3d at p. 182, fn. 7.) We review the failure to give a limiting instruction regarding the use of other crimes evidence for harmless error under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924-925.)

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[5] The jury also was instructed in terms of CALJIC Nos. 2.80 (expert testimony-qualifications of expert), 2.82 (hypothetical questions), and 2.83 (resolution of conflicting expert testimony).

White admits that his prior conviction was admissible to prove an element of the section 12021, subdivision (a)(1) charge. (See *Valentine, supra*, 42 Cal.3d at p. 173.) He also acknowledges that the nature of his conviction was withheld from the jury, which is the procedure required under *Valentine*. (*Id.* at pp. 173, 181-182.)

Nothing in the record suggests the jury was unduly influenced by the stipulation. The prosecutor did not make repeated references to the conviction or suggest that the jury consider it for any other purpose than reaching its verdict on the section 12021, subdivision (a)(1) charge. The jury found the gang allegation was not true, indicating that it weighed the evidence and reached conclusions based on the facts of the case rather than punishing White for his prior conviction.

Review of the entire record convinces us that there is no reasonable likelihood the outcome would have been different had the court provided the limiting instruction related to the admission of White's stipulation as to his prior conviction. Thus, any instructional error was harmless.

IV

White contends the court abused its discretion when it allowed the prosecutor to impeach Howard with evidence that she had told police officers that White always carried a gun. We review a trial court's evidentiary rulings for abuse of discretion.

White's trial attorney filed a motion in limine to exclude statements made to investigating police officers by Howard, White's former girlfriend. Howard had told the officers that White is "known to carry guns, is the kind of person that could shoot someone, and on one occasion she heard that he nearly did so." The court ruled the evidence was inadmissible.

The prosecutor called Howard as a witness. On cross-examination, White's attorney asked Howard, "Did you ever see Mr. White try to shoot somebody?" Howard responded that she had not. On redirect, the prosecutor reminded Howard that she testified that she never saw White shoot anybody. The prosecutor then asked, "Did you ever see him with a gun?" Howard said she had not. The prosecutor then asked, "Did

you tell detectives when they talked to you that Louis White always has a gun on his person?" Howard said she did not. White's attorney did not object.

The prosecution called Detective Todd Johnson, one of the investigating officers. The prosecutor asked him whether Howard had said that White always carries a gun. Defense counsel objected on the grounds that the evidence was irrelevant and was subject to the court's prior ruling on the motion in limine. The court ruled that the testimony was admissible to impeach Howard's testimony.

White concedes that Detective Johnson's testimony was relevant to contradict Howard's testimony and impeach her credibility. However, he argues that it was nonetheless inadmissible propensity evidence under Evidence Code section 1101, subdivision (a). That statute provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (c) of the statute provides: "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (Evid. Code, § 1101, subd. c.) The trial court ruled that Detective Johnson's testimony was admissible to impeach Howard. Since the evidence was offered to attack Howard's credibility, the evidence was admissible under Evidence Code section 1101.[6]

White also contends the probative value of this evidence was outweighed by undue prejudice and it should have been excluded under Evidence Code section 352. Prejudicial evidence need not be excluded if it is otherwise admissible and its probative value is not outweighed by its prejudicial effect. All relevant evidence is admissible unless otherwise provided by statute. (Evid. Code, § 351.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having any

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[6] White did not request a jury instruction informing the jury to use Howard's statements for the limited purpose of determining the weight to give to her testimony or her credibility as a witness. Thus, White forfeited any claim of error regarding the court's failure to provide a limiting instruction. (See Evid. Code, § 355.)

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

For purposes of determining whether probative value is outweighed by prejudicial effect, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that "'uniquely tends to evoke an emotional bias against defendant'" without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

We review the trial court's findings under Evidence Code section 352 for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.) We may not disturb the trial court's exercise of that discretion unless it is shown that the court exercised its discretion in an arbitrary, capricious or patently absurd manner, and resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) We find no abuse of discretion.

The trial court could reasonably conclude that Howard's statement to Detective Johnson that White is "known to carry guns" was relevant to the weight to be given to Howard's testimony. Moreover, it was White's attorney who made the issue relevant. He asked Howard whether she had seen White try to shoot anyone. White's attorney also did not object when, in response to the prosecutor's examination, Howard denied making the statement to Detective Johnson. Detective Johnson's testimony cast doubt on the rest of Howard's testimony, including her statement that White was not previously in a relationship with her, did not buy the red Acura Legend, and was not the only other person to drive the car. The court could reasonably find that this relevance outweighed any prejudice, especially since the testimony was not admitted for its truth but for impeaching Howard. The prosecutor asked whether she had told officers White always carries a gun, not whether White actually carries a gun at all times.

Even if we found an abuse of discretion, White would not be entitled to reversal since he has not demonstrated a probability that he would have obtained a more favorable result in the absence of the alleged error. (See *People v. Watson, supra,* 46 Cal.2d at p. 836; Cal. Const., art. VI, § 13.) While the prosecutor referred to the testimony in his

closing argument, he did so in the context of listing the ways in which Howard had been impeached. The evidence regarding Howard's false testimony and her true knowledge of White's reputation focused upon Howard's inconsistent statements to the police, not the truth of White's reputation for carrying a gun. For the additional reasons discussed in Section III, we conclude that any error was harmless.

V

White contends the court prejudicially erred by allowing the prosecutor to pose a hypothetical question to the expert witnesses on gangs which assumed that White had been incarcerated for a period of time before the homicide. We find no error.

White admitted a prior felony conviction for the charge of possession of a firearm by a convicted felon, section 12021, subdivision (a)(1). White's trial attorney filed a motion in limine to exclude all other evidence of White's prior convictions and the trial court granted the motion.

The prosecution called Detective Hector Gutierrez who worked in the LBPD's gang unit and had specialized knowledge of the gangs operating in Long Beach as an expert witness on gangs. Detective Gutierrez testified that LBPD officers had come into contact with White and filled out field information (F.I.) cards, a method used by LBPD to track suspected gang members, for each of these contacts. According to the F.I. cards, during one of the contacts with officers, White admitted he was a member of the Rolling 20's Crips gang.

On re-cross examination, White's trial attorney asked Detective Gutierrez how many contacts the LBPD had had with White since the year 2002. Detective Gutierrez counted three contacts. White's attorney then asked, "Would you expect an active gang member to have as few as three contacts in which he denies membership in two of them?" Detective Gutierrez responded, "It is not uncommon. That's normal." The attorney asked, "But isn't it true that you see people that have had a lot more . . . encounters[] than three in a decade?" Detective Gutierrez said "Yes. Absolutely."

On further redirect, the prosecutor asked if it was possible for the police to have contact with someone when that person is in state prison or county jail. The court

overruled White's trial attorney's objection. Detective Gutierrez answered that it was not possible.

White called Steven Strong, a retired Los Angeles Police Department detective, as a gang expert. During direct examination, White's trial attorney asked, "If someone . . . had three F.I. cards, he had three law enforcement contacts, in the last eight to ten years . . . what would your opinion be as to whether that person is an active member of the gang?" Strong answered, "Based on that, I couldn't form the opinion that he was an active gang member. There would be a lack of . . . a pattern of conduct . . . . That's not a lot[] of contacts for that period of time."

During cross-examination the prosecutor reminded Strong that he indicated that three contacts with officers over a period of eight to 10 years would not allow the expert to conclude that White was an active gang member. The prosecutor then asked, "If the person is in custody, [is he or she] able to have an F.I. card from contact with Long Beach P.D.?" Strong responded in the negative. Over defense counsel's objection, the court allowed the prosecutor to ask the following hypothetical: "So now assuming over those eight years where there were three contacts, the person had been in custody for at least five, maybe even up to six years of that time, would that change your opinion about whether or not the three contacts [were] important in determining whether or not the person was a gang member?" Strong said that would not change his opinion but again admitted that police officers would not be able to have contact with an individual who was incarcerated.

White concedes that he had been incarcerated for a five- to six-year period before the homicide and that the prosecutor's question was rooted in the facts shown by the evidence. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) He argues, however, that the probative value of the hypothetical question was outweighed by its prejudicial impact since it implied that White had been incarcerated in the past. We disagree.

White concedes that evidence regarding White's gang membership was relevant to motive. The probative value of evidence of motive "'generally exceeds its prejudicial

effect, and wide latitude is permitted in admitting evidence of its existence.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

White made the issue relevant when his trial counsel asked both experts their opinion as to whether three contacts over the course of eight years would suggest active gang membership. This question assumed that White was able to have contact with the LBPD, which was not the case since he was incarcerated for the majority of the eight-year time period. Whether White was incarcerated and thus unable to have contact with a police officer was clearly relevant to the experts' opinions as to whether three contacts over the course of eight years would suggest that individual is a gang member. "[I]t is permissible, and indeed common, to argue that an opposing expert's opinion is compromised by incomplete information, even where the information the expert failed to consider would not have been directly admissible for its truth." (*People v. Arias, supra* 13 Cal.4th at p. 184.)

Even assuming the court erred in allowing the prosecutor to pose the hypothetical question, it was harmless under *People v. Watson*, *supra*, 46 Cal.2d at page 836. The jury knew that White had been convicted of a felony from the stipulation admitting it. While the court did not provide a limiting instruction related to this conviction, we have already concluded that White suffered no prejudice from that omission.

Further, the hypothetical did not assert that White had been incarcerated, and the court provided the instruction in CALJIC No. 2.82 relating to hypothetical questions posed to expert witnesses. That instruction informed the jury: "It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts."

VI

White was charged with being a felon in possession of a firearm, a violation of section 12021, subdivision (a)(1), and the jury found him guilty. The jury was not instructed on the specific elements of the crime. While the failure to instruct on the

elements of a crime is erroneous, we conclude the error was harmless beyond a reasonable doubt.

CALJIC No. 12.44 is the instruction for the charge of violation of section 12021, subdivision (a)(1) that should be provided when the defendant has stipulated to his prior felony convictions. (*See People v. Valentine, supra,* 42 Cal.3d at pp. 181-183.) It instructs the jury in relevant part that the elements of the crime are (1) the defendant had a firearm in his possession or under his control, and (2) the defendant had knowledge of the presence of the firearm. (CALJIC No. 12.44). The instruction was not given.

The court did instruct the jury on the requisite intent for the charge, giving CALJIC No. 3.30.[7]

The court also instructed the jury as to the elements of the allegation that the defendant intentionally and personally discharged a firearm causing great bodily injury, CALJIC No. 17.19.5. That instruction provides: "If you find the defendant[] guilty of [murder], you must determine whether the defendant[] intentionally and personally discharged a firearm [and caused great bodily injury or death to a person] in the commission of [that felony]. [¶] The word 'firearm' includes [a Semi-automatic handgun]. [¶] The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant [himself] must have intentionally discharged it. [¶] . . . [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

A trial court has a sua sponte duty to instruct the jury on the elements of a charged offense (*People v. Flood* (1998) 18 Cal.4th 470, 504-505), and the inadvertent failure to do so is error. White contends the error is reversible per se, relying on *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*).

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[7] The court instructed: "In the crimes of Possession of Firearm by a Felon, as charged in Count Two, there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

"In *Cummings*, the trial court's instructions failed to define robbery, which was the subject of several of the charges against the codefendant, Kenneth Earl Gay. Except for a separate instruction informing the jury that '"robbery requires . . . the specific intent to permanently deprive the owner of its property"' (*Cummings*, *supra*, 4 Cal.4th at p. 1312, fn. 52), the jury was never informed of the elements of that crime or, in particular, instructed that 'to convict, it must find that personal property was taken from the robbery victims against their will by means of force or fear. . . .' (*Id*. at p. 1312.)" (*People v. Mil* (2012) 53 Cal.4th 400, 415-416 (*Mil*).) The California Supreme Court held that this error was reversible per se. (*Cummings, supra*, 4 Cal.4th at p. 1315.)

The court recently explained when instructional error is reversible per se or subject to harmless error analysis in *Mil, supra*, 53 Cal.4th 400. The court considered a claim of instructional error in failing to instruct the jury with all the elements of special circumstance felony-murder by a defendant who was not the actual killer. (*Id.* at p. 416.) It explained "the omission of one or more elements of a charged offense or special circumstance allegation is amenable to review for harmless error under the state and federal Constitutions, at least as long as the omission 'neither wholly withdrew from jury consideration substantially all of the elements . . . , nor so vitiated all of the jury's findings as to effectively deny [the] defendant[] a jury trial altogether.' [Citation.]" (*Id.* at p. 415.) The court concluded the error was not structural because "the jury, under concededly correct instructions, made several essential findings concerning the existence of, and defendant's participation in, the burglary, robbery, and murder—as evidenced by defendant's conviction for first degree felony murder." (*Id.* at p. 416.)

Here the jury effectively found all the elements necessary to sustain White's conviction for a violation of section 12021, subdivision (a)(1). In order to find beyond a reasonable doubt that White intentionally and personally discharged a firearm, the jury necessarily found beyond a reasonable doubt that White knowingly possessed a firearm. This was the only finding essential to the conviction since White stipulated to his status as a prior felon,

This is "not one of the 'rare cases' where the error can be deemed structural" (*Mil, supra,* 53 Cal.4th at p. 417, citing *Washington v. Recuenco* (2006) 548 U.S. 212, 218) and reversible per se. Thus we must consider whether it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Id.* at p. 417.) We are convinced that it did not since the jury found true that White intentionally and personally discharged a firearm in the commission of the murder.

VII

White argues the cumulative effect of the errors was prejudicial.

In a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice. "[T]he litmus test is whether [the] defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

As we have explained, there were two instructional errors. One involved the court's failure to provide a limiting instruction on the use of White's prior conviction and the other the lack of a specific instruction on the elements of section 12021, subdivision (a)(1). As discussed, these errors were harmless. We find no reasonable probability that the jury would have reached a result more favorable to White in the absence of these two errors.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.